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IN THE

Supreme Court of the United States

OCTOBER TERM — 1946

No. 455.

FRED J. MARTIN, Trustee (Objectant),
Petitioner,
against
EUGENE CAMPANARO, EDWARD GRIMM, JAMES MURPHY, JOHN WELLMAN, JACK CELLELLA, EDWARD THORN, DAVE BARTLEY, ANTHONY RAGOZZINO, JOHN MENCHEN, SAM NUSSO, JAMES URSO, LEON DOERR, FRANK BRUNO, EMIL ISOLA, JAMES RECLA, IRVING DREISACKER, JOSEPH BRIENZA, THOMAS TOBIN, GEORGE FARINA, BERNARD COFFEY, GEORGE NADAR, DANIEL WEIR, SALVADORE CARELLI, BURNETT FULLER, JOHN ADAMI, ANGELO CASSANO, VINCENT CAMMARATA, CARMINE GIORDANO, PETER CACABRESE, WALTER REEVES, FRANCIS LOTZ, OTTO WOLPERT, LOUIS CAMPANARO, WALTER CVARNESKI, GEORGE MOGLEY and PETER WILCHA, (Claimants),
Respondents.

In the Matter
of
Suburban Bus Co., Inc., Bankrupt.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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On page 2 of Respondents' brief the statement is made that on April 19th, 1944 "Amalgamated notified Suburban of Amalgamated's desire to terminate the contract which would expire on May 23, 1944." That is not a correct statement and is not supported by anything in the record in this case. All that the notice stated was that Amalgamated

wished to confer with Suburban for modifications and revisions of the collective agreement for the ensuing year.

On page 5 of Respondents' brief a quotation is made from the case of the City of New York v. Davis, 7 F. (2) 566, which deals with an action based on quasi contract. That is not applicable to the case at bar because all of the courts below have concluded that a contract implied in fact arose from the conduct of the parties. The only difference is that the Referee in Bankruptcy and the District Court held that this implied contract was to pay the same rate of wages as the Respondents were paid prior to May 24, 1944 (R. 88), whereas the Circuit Court held that there was a contract implied in fact to pay the reasonable value of the services of Respondents (R. 114).

On page 5 of Respondents' brief it is stated "that petitioner does not claim that the monies paid respondents by Suburban after May 24, 1944, constituted the reasonable value of the services performed." That question is not involved in this case. The respondents herein as is true of almost all employees anywhere were not hired or paid on *a quantum meruit* basis, but rather for a specific rate of wage per hour which Suburban or the trustee paid to them and which they accepted without protest or reservation at the end of each work week. There was no agreement to pay them the reasonable value of their services as such, nor can such a conclusion be reached from the facts in this case or in considering the conduct of the parties.

On pages 7, 8 and 9 of the respondents' brief reference is made to the facts and opinion in the case of New York Telephone Company v. Jamestown Telephone Corporation, 282 N. Y. 365. In that case the Court stated that "the de-

fendant having given notice that the contract would end on March 1, 1932, did nothing in the interval which evinced any intention to withdraw the notice or which was in any way inconsistent with such notification * * * On the contrary, it affirmatively appears * * * that the defendant did not intend to withdraw its notice and always contended that the contract was at an end; and the plaintiff recognized that the contract was terminated * * *." There was no such notice of termination of the contract given in the case at bar. Furthermore the claimants by their conduct did not show that they regarded the contract at an end. They were paid and they accepted in full each week the same wages they had been previously paid. Furthermore Suburban never recognized that the contract was terminated but acted at all times in support of and insisting on said contract as being in full force and effect.

The statements made on page 10 of respondents' brief regarding what Amalgamated did or might have intended to do are not very material in this case. There is no proof in the record of any agreement as to retroactive application or as to any new or different wage scale. The implied contract which the Referee found was one that arose out of the conduct of the claimants and Suburban. Amalgamated is not the claimant against the bankrupt estate. Amalgamated did not work for the bankrupt. It was the employee-claimants who worked and performed services for Suburban and who were paid their wages in full each week for their services. While Suburban was a party to the negotiations and hearings wherein Amalgamated was "vigorously" asserting claims to wage increases, it should be borne in mind that at the same time Suburban was just as vigorously resisting these claims for any increase of wages. At no time in the negotiations or hearings did Suburban

agree with Amalgamated or the claimants on a mutual basis to pay increased wages and at no time did Suburban agree to make any back-pay adjustments with the claimants. Suburban insisted on paying the previous rate of wage and did so with the consent of the claimants. There is no basis in law or in reason to force a different rate or computation of wages upon Suburban retroactively and against its intent. Such intent is necessary as this has been held by the courts below to be a contract implied in fact.

On pages 12 and 13 of the respondents' brief reference is made to the case of Meislahn v. Irving National Bank. That case is not in point because in the instant case there was no promise by Suburban to pay these claimants more money than the weekly payroll paid to them and accepted by them, whereas in the Meislahn case *the employer promised the plaintiff an increase in salary.* In the Meislahn case when the plaintiff took on his new duties he asked about his salary and his boss told him "that would be made satisfactory the first of the year." He asked shortly after the beginning of the year where was his increase and his boss then said "that will be all right, you will get that later." The next month he asked again for his back pay and was assured again "it will be all right." The dissenting opinion in that case is premised on the basis that there was *no promise* made to give the employee an increase in salary. On the other hand the majority opinion (Judge Laughlin) states the following at page 238:

> "The jury were justified in finding that the plaintiff remained in the employ of the defendant in the expectation that *it would perform the agreement of its Cashier fixing a salary that would be satisfactory to him.*" (Italics mine.)

Negotiations for a new scale of wages in the Meislahn case would have been meaningless had there not been a

definite promise on the part of the employer to pay the employee an increase in wages. The claimants in this case completely ignore the fact that there was *no promise* by Suburban to pay these claimants additional or increased compensation. *This is the crux of the case.* Negotiations or attempted settlement do not constitute an agreement to pay an increase in wages, where as in the instant case these negotiations ended in a complete stalemate. On the other hand Suburban did pay and the claimants did accept during all this time wages in full each week on the basis of the previously existing agreed rate of wage.

The following statement is made on page 17 of respondents' brief: "The record indicates that the petitioner discharged each and every one of respondents under circumstances which amount to an unfair labor practice." That statement is without factual basis and there is nothing in the record in this case to support it. Furthermore the question of unfair labor practice was not involved in or passed on in the case at bar. Petitioner was and is a Trustee in Bankruptcy appointed by and responsible to the Bankruptcy Court, being under bond and subject to court order and direction at all times in carrying on the business of the bankrupt, and finally in selling the assets and business of the bankrupt. It is submitted that the statement quoted above from respondents' brief is unfair and apparently was made merely to confuse the issue or to create sympathy.

In answer to the argument contained at the top of page 18 of respondents' brief, suffice it to say that the claimants were not forced to work for Suburban and if they were not satisfied with the wages that Suburban was willing to, and did pay them, they did not have to work for Suburban and could have worked elsewhere and for anyone else. This would be true whether there was a union involved or not.

It is again respectfully requested that the petition for the writ of certiorari herein be granted.

Respectfully submitted,

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SIDNEY H. REICH,
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Fred J. Martin, Trustee.